



NORTH CAROLINA

State Board of Elections & Ethics Enforcement

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611

(919) 814-0755

December 28, 2018

VIA ELECTRONIC MAIL

Alexander Dale
acd@wardandsmith.com

Re: Emergency Petition to Certify the Election by the Mark Harris for Congress Committee (the "Petition").

Attorney Dale:

The State Board of Elections & Ethics Enforcement (the "State Board") received the above-referenced Petition by email at 10:15 a.m. today. It was transmitted to all appointed State Board members at 10:16 a.m. Your Petition requests certification before noon today, which would require consideration in an emergency meeting called by the Chair or by a majority of State Board members. *See* G.S. § 163A-3(a). Neither has occurred. As of the issuance of this letter, only two board members requested a meeting to consider your petition.

As Chair of the State Board, I am familiar with the progress of the agency's investigation and announced hearing on *In re Investigation of election irregularities affecting counties within the 9th Congressional District* (herein "*In re Investigation of Election Irregularities*"), a matter now pending before the State Board under G.S. §§ 163A-1180 and 163A-1181 (fmr. G.S. §§ 163-182.12 and 163-182.13, respectively).

The State Board, as presently constituted with nine appointees, initiated *In re Investigation of Election Irregularities* on its own motion. On November 27, the State Board convened the canvass and authentication meeting required by G.S. § 163A-1172(c) (fmr. G.S. § 163-182.5). After extensive briefing from counsel and investigators in closed session, the State Board unanimously declined to certify results in the contest for election to the U.S. House of Representatives in the 9th Congressional District in the exercise of G.S. § 163A-1180 (fmr. G.S. § 163-182.12), which provides as follows in relevant part:

The State Board may consider protests that were not filed in compliance with G.S. 163A-1177, may initiate and consider complaints on its own motion, may intervene and take jurisdiction over protests pending before a county board, and may take any other action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election.

On November 30, the State Board ordered officials in Bladen and Robeson counties to withhold certificates of elections in three additional contests: District Court in Judicial District 16B (Seat 2), Bladen County Commissioner (District 3), and Bladen Soil and Water Conservation District Supervisor. The apparent margin of victory in each additional contest represented fewer votes than those presently under scrutiny in connection to *In re Investigation of Election Irregularities*. In addition, on November 30, the State Board again declined to certify the results and announced that an evidentiary hearing would be held.

After consultation with all board members, on December 17 I executed the enclosed Order of Proceedings on *In re Investigation of Election Irregularities* announcing a hearing on January 11 before the State Board “however constituted as the body then-authorized to enforce G.S. §§163A-1180 and 163A-1181 or G.S. §§163-182.12 and 163-182.13.” The Order of Proceedings established evidentiary standards and procedural requirements governing the State Board’s consideration and adjudication of this matter. It established relevant dates as follows:

- December 21: Submission of affidavits and evidentiary exhibits.
- January 6: Submission of briefs and applications *pro hac vice*.
- January 11: Hearing by the State Board at the N.C. State Bar.

While entry of a written order will conclude the State Board’s resolution of *In re Investigation of Election Irregularities*, the State Board’s work is ongoing, involving substantial efforts to gather evidence and assess allegations of unlawful conduct affecting the elections process in certain counties within the 9th Congressional District. To date, the State Board’s investigative staff has conducted more than 100 interviews, and the staff is actively engaged in the review of more than 182,000 pages of materials produced in response to 12 subpoenas for documents issued by the State Board under G.S. § 163A-4(a) (fmr. G.S. § 163-23). Based on a recommendation from staff, the Board issued numerous additional subpoenas today.

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As you know, your client is under a subpoena dated December 1, but has made only one production on December 7 totaling 398 pages. Yet your client through counsel indicated that you possess roughly 140,000 additional documents that may be responsive but have not yet been produced. We have received repeated assurances—as recently as December 24—regarding your efforts to comply with the subpoena. You are hereby requested to fully comply with the Board’s subpoena so as to not further impact the agency’s ability to resolve the investigation.

Staff at the agency have made several attempts to schedule an interview with your client. On December 7 counsel for the Harris Committee by phone indicated your client would be willing to sit for an interview following production of documents. Your client retained individual counsel and on December 24 agency staff sought to confirm his continued intent to be interviewed. We await confirmation of the same.

As you are aware the State Board has endeavored to meet its statutory obligations in a transparent manner. We have and we will continue to provide public access to documents and evidence to the fullest extent possible without undermining current investigative efforts. To date, more than 8,000 pages of materials have been posted publicly. The evidentiary hearing itself will be public.

The main goal of State Board staff has been and continues to be a thorough and transparent investigation into elections irregularities, so that State Board members have as much evidence as possible in front of them when they consider whether to certify the 9th Congressional District contest or order a new election. The faith of voters in our election system depends on that.

Best Regards,



Joshua D. Malcolm

Chair

State Board of Elections & Ethics Enforcement

cc: State Board Members

Encl.



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IN THE MATTER OF:)	
Investigation of election)	ORDER OF PROCEEDINGS
irregularities affecting counties)	
within the 9th Congressional)	
District)	

As directed on the Notice of Date of Hearing, this matter will come before the State Board of Elections and Ethics Enforcement ("State Board"), however constituted as the body then-authorized to enforce G.S. §§163A-1180 and 163A-1181 or G.S. §§163-182.12 and 163-182.13, in a hearing to begin at 10 a.m. on January 11, 2019. The State Board will consider evidence and hear testimony in connection with an investigation into irregularities and alleged misconduct in certain counties within North Carolina's Ninth Congressional District. The proceedings affect the final certification of results in four contests in the 2018 general election: (1) U.S. Representative for North Carolina's Ninth Congressional District; (2) Seat 2 on the District Court in Judicial District 16B; (3) Bladen County Commissioner District 3; and (4) Bladen Soil and Water Conservation District Supervisor (together, the "Contests").

The Board on November 30, 2018, determined it was necessary to stay final certification of the latter three Contests because the apparent margin of victory in each race represents fewer votes than those under scrutiny in the State Board's investigation.

The hearing will commence at 10:00 a.m. in the courtroom of the North Carolina State Bar, located at 217 East Edenton Street in Raleigh, North Carolina.

The matter will be considered as follows:

Written Briefs

1. Candidates in the affected Contests shall have the opportunity to submit written briefs describing their positions on whether the State Board should either (a) certify their respective elections under G.S. § 163A-1184 (163-182.15) or (b) order that new elections be held under G.S. § 163A-1181 (163-182.13). All written briefs must be received by the State Board no later than 5:00 p.m. on January 6, 2019. Submissions must be filed electronically by email to legal@ncsbe.gov. See Paragraph 6 for distribution of materials.
2. Candidates with aligned interests are encouraged to coordinate among themselves to minimize duplication in their written briefs.
3. No brief may exceed 20 pages produced to conform with the font size and spacing specifications found in Rule 28(g)(1) of the North Carolina Rules of Appellate Procedure. Exhibits will not count against the maximum page count. Among other issues, the briefs should address the application of *In re Judicial Review by Republican Candidates for Election in Clay County*, 45 N.C. App. 556, 264 S.E.2d 338 (1980).
4. Statutory citations may reference section numbers either from Chapter 163A or Chapter 163, understanding that the proper citations are not easily obtainable through publicly available sources or subscription services. Parallel citations are encouraged but not required: “G.S. § 163A-1184 (163-182.15).” A conversion table is available at <https://goo.gl/19pRR4>.
5. General objections may be attached to the filed brief as an addendum, which shall not count against the page count specified in Paragraph 3. It will not be necessary to raise objections orally at the hearing if they have been filed as described. Such written objections shall be deemed under the State Board’s advisement once filed, and any objection not specifically sustained shall be deemed denied.
6. Given the compressed deadlines governing this matter, parties are not required to individually serve materials on each other. Rather, all briefing materials or supplemental orders shall be uploaded to the following online portal, and all parties shall be responsible to check the portal for updated

information: <https://goo.gl/GjxKh5>. Any party for whom online access poses a prejudicial burden shall petition the State Board in writing for an exception.

Documents

7. All candidates and other interested parties will continue to have access to relevant documents in the online portal first announced and made available by the State Board on December 4, 2018: <https://goo.gl/GjxKh5>. The State Board will continue to make documents available at that online portal at least through the January 11, 2019, and likely thereafter. Parties are encouraged to reference documents by the exhibit number identified in the portal.

8. All candidates and other interested parties who wish to submit affidavits or other pieces of evidentiary information may upload the same through a portal opened for that purpose until 5 p.m. on December 21, 2018: <https://goo.gl/forms/fVVyTBuLcgRNePxu1>. The deadline in no way obviates the deadline for production required under any subpoena issued by the State Board on this matter.

Order of Matters Presented at the Hearing

9. At the hearing, the State Board's staff will make an initial presentation regarding the underlying information learned in the course of their investigation.

10. After the initial presentation, the State Board chair will call witnesses and staff will examine those witnesses to develop the record on which the State Board will make factual findings necessary to certify the Contests, order new elections, and/or take other appropriate action.

11. Those witnesses will also be available for supplementary examination by State Board members and for cross-examination by counsel for candidates in the affected Contests, or by the candidates themselves if they are unrepresented.

12. Duplicative questioning will be severely restricted, and the State Board's Chair will retain discretion to limit questioning by time.

13. Candidates in affected Contests, either personally or through counsel, will have the opportunity to make their cases in chief after the State Board staff's presentation and calling of the staff's witnesses. The candidates, either personally or through counsel, will be allowed to call further witnesses, who will be subject to examination as described in Paragraphs 10, 11 and 12.

Evidentiary Standards

14. The hearing will not be subject to the North Carolina Administrative Procedure Act (the "APA"), but the Board will be guided by the criteria laid out in the APA. For example, hearsay evidence will likely be admitted if found to be reliable. *See, e.g., N.C. Dep't of Pub. Safety v. Ledford*, 247 N.C. App. 266, 290-91, 786 S.E.2d 50, 66 (2016). Articles from the news media may in some limited instances be admitted if offered for something other than the truth of the matter asserted. *See, e.g., State v. Locklear*, 322 N.C. 349, 360, 368 S.E.2d 377, 384 (1988). All regular exceptions to hearsay will apply, and the hearing is likely to include substantial testimony relaying statements against penal interest.

15. In no event, however, will the hearing "dispense with any essential element of a fair trial." *See Humble Oil & Ref. Co. v. Bd. of Aldermen of Town of Chapel Hill*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974). That is, in accordance with the procedures outlined above, (1) parties whose rights are being determined will be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver, the Board will not base findings as to the existence or nonexistence of crucial facts upon unsworn statements; and (3) crucial findings of fact that are "unsupported by competent, material and substantial evidence in view of the entire record as submitted" will not stand. *Id.*

16. This administrative hearing may involve information that affects other proceedings that bear on criminal or civil liability. The failure of an individual or entity to make themselves available for interview(s) following the request of the State Board, the failure of an individual or entity to produce all material either requested or subpoenaed by the State Board, and the failure of any individual or entity to attend the hearing pursuant to the terms of the State

Board's subpoena may permit the State Board members to draw adverse inferences against those individuals or entities. *See Nantz v. Employment Sec. Comm'n*, 290 N.C. 473, 478, 226 S.E.2d 340, 343 (1976) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

Attorneys Not Admitted to the North Carolina State Bar

17. Attorneys not admitted to the North Carolina State Bar who wish to appear at the hearing for candidates for election in the Races should submit applications to appear *pro hac vice* to legal@ncsbe.gov by 5 p.m. on January 6, 2019.

Deliberation & Ruling

18. The State Board members will deliberate in open session once the case is submitted, unless it convenes in closed session by majority vote for purposes permitted under G.S. § 143-318.11. The State Board will rule on the matter by vote in open session. A written order prepared by counsel and signed by the Chair will follow the vote, consistent with the regular practice of the State Board.

Attendance & Press

19. The hearing shall be open to the public, subject to the facility rules of the State Bar and all applicable occupancy and safety restrictions. Entry will be ensured for the parties, their counsel, witnesses, and for members of the press described in Paragraph 20. Members of the public will be admitted on a first-come basis. Time restrictions may be imposed by the Chair if necessary to accommodate public attendance.

20. All non-credentialed press must gain admittance alongside the public. To obtain press credentials, members of press must contact State Board Public Information Officer Patrick Gannon (Patrick.Gannon@ncsbe.gov), who shall exercise discretion in the issuance of credentials. Between one and three pool cameras will be permitted, within the discretion of P.I.O. Gannon and subject to the facility rules of the State Bar.

Maintenance of Order

21. The Chair may supplement portions of this Order, if deemed necessary and advisable. All parties, witnesses, and attendees are hereby placed on notice of the Chair's intent to exercise authority under G.S. § 163A-744 (G.S. § 163-24) to maintain order and to ensure adherence to the State Board's lawful commands:

The State Board shall possess full power and authority to maintain order, and to enforce obedience to its lawful commands during its sessions, and shall be constituted an inferior court for that purpose. If any person shall refuse to obey the lawful commands of the State Board or its chairman, or by disorderly conduct in its hearing or presence shall interrupt or disturb its proceedings, it may, by an order in writing, signed by its chairman, and attested by its secretary, commit the person so offending to the common jail of the county for a period not exceeding 30 days. Such order shall be executed by any sheriff to whom the same shall be delivered, or if a sheriff shall not be present, or shall refuse to act, by any other person who shall be deputed by the State Board in writing, and the keeper of the jail shall receive the person so committed and safely keep him for such time as shall be mentioned in the commitment. Provided, that any person committed under the provisions of this section shall have the right to post a two hundred dollar (\$200.00) bond with the clerk of the superior court and appeal to the superior court for a trial on the merits of his commitment.

This the 17th day of December, 2018.



Joshua D. Malcolm
Chair

CERTIFICATE

I, Josh Lawson, general counsel to the North Carolina State Board of Elections, do hereby certify that agency staff posted the foregoing document(s) in the manner directed by Paragraph 6 of the Order of Proceedings on Friday, December 28, 2018:

<https://dl.ncsbe.gov/index.html?prefix=State Board Meeting Docs/Congressional District 9 Portal/>

This Certificate was executed and affixed on the below-indicated date.

This the 30th day of December, 2018.

A handwritten signature in black ink, appearing to read "Josh Lawson", is written over a horizontal line.

Josh Lawson,
General Counsel
N.C. State Board of Elections